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THE THEORY OF A PLEADING.

In these days of codes, of the abolition of forms and fictions in pleading, and of easy and cheap amendments, one may perhaps be expected to apologize for wasting printers' ink and readers' time on a point of pleading. But pleading is not yet simplified out of existence. A glance at the notes of Judge Bogle in the fourth edition of Pomeroy's Code Remedies reveals what a stream of modern decisions there is. The so-called common law states are no less prolific. Almost every late volume of the decisions of the Supreme Court of Illinois contains a dozen or more cases involving questions of pleading. The space given to pleading in the Encyclopedias and the local text-books on the subject indicates that the profession is willing to pay for real information about modern pleading, despite the fact that the last edition of Chitty was published in 1876. Nor is it probable that the law of pleading will ultimately become obsolete. The need that each party should be notified before trial of the positions of the other party, so that evidence to combat these positions may be gathered, will no doubt always be satisfied by some sort of pleadings. Their form will probably be still further simplified. Our codes are not the last words on the subject. But pleadings will remain. We may then, even yet, be serious about a point of pleading.

"It is an established rule of pleading that a complaint must proceed upon some definite theory, and on that theory the plaintiff must succeed, or not succeed at all. A complaint cannot be made elastic so as to take form with the varying views of counsel."[1]

Is this so? And first, What does it mean? To answer this latter question some discriminations are necessary.

Questions concerning the limits of amendment are to be distinguished. Our problem is, whether, the pleading being drawn

[1]Quotation from Mescall *v.* Tully (1883) 91 Ind. 96, 99, found in Oölitic Stone Co. *v.* Ridge (Ind. 1908) 83 N. E. 246, 7.

on one theory, the party may win by proving a right to succeed on another theory and without amending his pleading so as to make it conform to his new theory. The question whether he could change his theory by amendment is obviously a different one. It is a part of the much mooted question of when an amendment introduces a new cause of action, a question too complicated to be touched upon in this paper.

Suppose the new theory upon which counsel relies requires the proof of facts not alleged. Plainly he will fail. The fundamental proposition that one cannot prove facts not alleged is true whether we are dealing with common law pleading,[2] equity pleading,[3] or code pleading.[4] It is simply a case of variance between the allegations and the proof. Our problem, then, only arises when there are sufficient facts in the pleading to sustain the new theory and when they were not alleged to make out this new theory but merely in aid of the real theory of the pleading.

Again we must remember that under the common law system it was impossible to bring an action in one form of action and then to recover on proof of facts sufficient to maintain another form of action.[5] The application of this prohibition by a Court is therefore hardly to be considered as a decision bearing upon our present question. No doubt the origin of this rule is to be found in historical accident. The forms of action grew up separately. Later, when pressed for a reason to sustain a rule so severe, the judges stated that "It is of importance that the boundaries between the different actions should be preserved, * * *" and called attention to minor differences as to pleas, costs, and the effect of judgments.[6] These minor differences could easily have been prevented from causing any injustice. Quite commonly one can amend into

[2]Horsefall *v.* Testar (Eng. 1817) 7 Taun. 385; Blanchard *v.* Co. (1888) 126 Ill. 416; Dewey *v.* Williams (1861) 43 N. H. 384; Sheehy *v.* Mandeville (U. S. 1812) 7 Cranch 208; Woodstock Bank *v.* Downer (1854) 27 Vt. 482.

[3]Ferraby *v.* Hobson (Eng. 1847) 2 Phil. Ch. 255, 8; Gage *v.* Curtis (1887) 122 Ill. 520; Scudder *v.* Young (1845) 25 Me. 153; Rigg *v.* Hancock (1882) 36 N. J. Eq. 42; Pacific R. R. *v.* Ketchum (1879) 101 U. S. 289, 297.

[4]Carpentier *v.* Brenham (1875) 50 Cal. 549; Lumbert & Co. *v.* Palmer (1870) 29 Ia. 104; Cole *v.* Armour (1900) 154 Mo. 333, 51; Stevens *v.* City (1881) 84 N. Y. 296, 305; Willis *v.* Branch (1886) 94 N. C. 142, 7.

[5]Reynolds *v.* Clerk (1725) 8 Mod. 272; Savignac *v.* Roome (1794) 6 D. & E. 125; Creel *v.* Kirkham (1868) 47 Ill. 344, 9; Mulvey *v.* Staab (1887) 4 N. Mex. 172; Vail *v.* Lewis (1809) 4 Johns. 450, 8; Hughes *v.* Wheeler (1871) 65 N. C. 418; Berry *v.* Hamill (1824) 12 S. & R. 210; Royce *v.* Oakes (1898) 20 R. I. 418.

[6]Savignac *v.* Roome (1794) 6 D. & E. 125.

a different form of action.[7] It would seem, therefore, that the rule forbidding recovery in a different form of action from that in which the action is brought, must rest to-day on the same reasons as the rule of the Indiana Court, quoted above, forbidding a shifting of the theory of the action. However, the authorities establishing the rule that one cannot depart from his form of action are not further considered in this paper. That rule is to be discriminated from the one we are to discuss. At common law, then, our question could only arise when both theories, that of the pleading and that to which counsel wishes to change, are within the same form of action.

In equity pleading there does not seem to have been a classification of suits analagous to the forms of action at common law. It is true that bills were divided into well-known groups: original bills, supplemental bills, bills of revivor, and others. But if a bill of one kind was filed and it developed later that its facts and the relief sought required a bill of a different kind, the bill filed would be considered as of the latter class.[8] Therefore, in equity pleading, there is the same chance of the question arising, of following the theory of the pleading, as there is under the codes.

The answers that the Courts have given to the question, whether one must follow the theory of his pleading, have certainly been far from harmonious. In England a leading case was *Charnley* v. *Winstanley*.[9] The plaintiff sued for the breach of an arbitration agreement, relying for recovery on the fact that the defendant had not performed the award. In the declaration it was alleged that the defendant had married before the award was made. It was held that this destroyed the breach on which the plaintiff relied since it invalidated the award by revoking the power of the arbitrators. But it was also held that such revocation itself, being a breach of the agreement to refer and not to revoke, was a sufficient breach and that the plaintiff could recover on that. Evidently the

[7] Billing *v.* Flight (Eng. 1815) 2 Marsh. 124; May *v.* Gesellschaft (1904) 211 Ill. 310; Stebbins *v.* Co. (1879) 59 N. H. 143; Smith *v.* Savin (1894) 141 N. Y. 315; Chapman *v.* Barney (1889) 129 U. S. 677.

[8] *Ex parte* Smith (1859) 34 Ala. 455, 7; Sayre *v.* Co. (1882) 73 Ala. 85, 97; Curry *v.* Peebles (1887) 83 Ala. 225; McConnell *v.* Gibson (1850) 12 Ill. 128, 30; Carneal *v.* Wilson (Ky. 1823) 3 Litt. 80, 90; Ridgely *v.* Bond (1862) 18 Md. 433, 50; Northman *v.* Co. (1873) 1 Tenn. Ch. 312; Arnold *v.* Moyers (Tenn. 1878) 1 Lea 308, 15; Shainwald *v.* Lewis (1805) 69 Fed. 487, 495. A pleading filed as a petition may be sustained as a bill. Belknap *v.* Stone (1861) 1 Allen 572; Majors *v.* McNeilly (Tenn. 1872) 7 Heisk. 294; Sayres *v.* Wall (Va. 1875) 26 Gratt. 354, 77. Likewise a bill may be sustained as a petition. Foscue *v.* Lyon (1876) 55 Ala. 440, 56; Miller *v.* Saunders (1855) 18 Ga. 492; Griggs *v.* Co. (1862) 10 Mich. 117, 122.

[9] (K. B. 1804) 5 East 266.

plaintiff recovered according to a theory totally different from that on which his declaration was based. The case is directly *contra* to the rule of the Indiana Court quoted above.[10] The argument of the Court was that the breach in revoking the arbitrator's authority by marrying was simply informally alleged, that while this might have been an objection on special demurrer it was clearly not open in arrest of judgment, being a defect in form. This reasoning seems unanswerable unless there is a rule that one must recover according to the theory of his pleading. Apparently no such rule was known to the Court of King's Bench in 1804.[11]

There were later dicta recognizing *Charnley* v. *Winstanley*.[12] But in *Thom* v. *Bigland*[13] the Court of Exchequer rendered a decision really contrary. An action was brought for fraudulent misrepresentations by the defendants, the plaintiff's brokers. The representations concerned their actions as agents of the plaintiff. Baron Parke said[14] that whether the defendants were liable independently of the fraud he would not inquire, since the basis of the declaration was the fraud. No other reasons are given. The idea that one must recover according to the theory of his action seems, however, to be at the bottom of the decision.

These cases were common law cases. Meanwhile British courts of equity had established a rule that if a bill is based on fraud and the proof of fraud fails the plaintiff cannot recover on another theory even though there are sufficient facts stated in the bill.[15] This rule seems to have been based originally on the notion that a charge of fraud is so serious that one ought to make it only at the peril of failing entirely if he does not prove it. In *Glascott* v. *Lang*[16] the Lord Chancellor said:

"* * * where a bill is filed making a case of alleged fraud, and the fraud is disproved or not established, the court will not

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[10]P. 523.

[11]Charnley *v.* Winstanley was based on Le Bret *v.* Papillon (K. B. 1804) 4 East 502. This case held that a plea could be sustained on a different theory from that of the pleader. The arguments were much the same as in Charnley *v.* Winstanley. See also Williamson *v.* Allison (1802) 2 East 446.

[12]Head *v.* Baldrey (K. B. 1837) 6 A. & E. 459; Swinfen *v.* Chelmsford (Exch. 1860) 5 H. & N. 890, 920.

[13](1853) 8 Exch. 724.

[14]Ib. 731.

[15]Ferraby *v.* Hobson (1847) 2 Phil. Ch. 255; Glascott *v.* Lang (1847) 2 Phil. 310, 320-2,—(In this case, the last, and probably others, the allegations independent of fraud were made to anticipate defenses.); Price *v.* Berrington (1850) 3 Macn. & G. 486, 98; Hickson *v.* Lombard (1866) L. R. 1 H. L. 324, 31, 36; London Bank *v.* Lempriére (1873) L. R. 4 P. C. 572, 97.

[16](1847) 2 Phil. 310, 322.

allow such a bill to be used for any secondary purpose; because the door of this court being always open to allegations of fraud, it would be unjust, and much to be deprecated, to afford any encouragement to such allegations by allowing a party to try the experiment of obtaining relief on that ground, and if it failed, to fall back upon his bill for some inferior kind of relief."

In later cases, however, it was held that a charge of fraud might be made and be unproved and yet the plaintiff succeed on other allegations in his bill, if the allegation of fraud was subsidiary and not the foundation of the bill.[17] In *Hickson* v. *Lombard*[18] the reason for the rule is stated. The Lord Chancellor said:[19]

"* * * where a bill alleges matters of fraud, and all the subsequent considerations depend on these matters which are not proved, the court must necessarily dismiss the bill; 'but if fraud be imputed, and other matters alleged which will give the Court jurisdiction as the foundation of a decree, then the proper course is to dismiss so much of the bill as is not proved, and to give so much relief as, under the circumstances, the plaintiff may be entitled to.'"

And Lord Cranworth said:[20]

"* * * I subscribe most readily to the doctrine that, where pleadings are so framed as to rest the claim for relief solely on the ground of fraud, it is not open to the plaintiff, if he fails in establishing the fraud, to pick out from the allegations of the bill facts which might, if not put forward as proofs of fraud, have yet warranted the plaintiff in asking for relief. A defendant, in answering a case founded on fraud, is not bound to do more than answer the case in the mode in which it is put forward. If, indeed, relief is asked alternatively, either on the ground of fraud, or, failing that ground, then on some other equity, a plaintiff may fail on the first but succeed on the latter alternative. But, then, the attention of the defendant has been distinctly directed to it, and he has been called on to answer the case according to both alternatives."

No doubt the result of these cases is that where fraud is the basis of the bill, the theory on which the plaintiff sues, it must be proved or the plaintiff will fail; where, however, fraud is a subsidiary allegation, *i. e.*, alleged to anticipate a defense, or as an alternative ground of recovery, the plaintiff may succeed on his other allegations though the fraud is not established. And the last quotation gives the reason. One must abide by his theory because

[17]Hickson *v.* Lombard (1866) L. R. 1 H. L. 324, 31, 36; London Bank *v.* Lempriére (1873) L. R. 4 P. C. 572, 97; Hilliard *v.* Eiffe (1874) L. R. 7 H. L. 39, 51-2; Thomson *v.* Eastwood (1877) L. R. 2 A. C. 215, 241, 250.
[18]L. R. 1 H. L. 324.
[19]At p. 331.
[20]At p. 336.

otherwise the defendant may be misled in shaping his defense. All this is simply our Indiana rule applied, however, to but one case, that where the theory of the pleading is fraud. Oddly enough, *Thom* v. *Bigland*[21] was a case where the original theory was fraud. But the equity cases were not referred to in it and the language of the Court is hardly confined to a case of fraud. Quite as oddly a later common law case coming up to the Privy Council from Quebec[22] was a case where the original theory was fraud, and in it again the equity cases are unnoticed.

This amount of attention has been given to the English law because of its curious development and to contrast it with the Indiana law. Except as to cases of fraud, it is certainly difficult to say whether the rule that one is confined to the theory of his pleading is the law of England or not. But in Indiana there is no room for doubt. Beginning, it seems, in 1880, there has been a veritable stream of decisions maintaining the rule that one must abide by the theory of his pleading.[23] Perhaps the first case was *Neidefer* v. *Chastain.*[24] In it, to an action on a note, the defendant pleaded fraud. His plea also contained the statement, made in alleging the falsity of the representations, that the screens, the right to sell which was the consideration of the note, were worthless.[25] The fraud being inadequately alleged, it was claimed that this statement made the plea sufficient as alleging the failure of consideration. It was held that since the basis or theory of the plea was fraud the defense of failure of consideration was not open even if the statement were a sufficient allegation that the consideration had failed. The Court said:[26]

"The bare general allegation that an article was worthless, thrown into a plea attempting to set up the defense of fraud, can not make good a plea which without it would be bad. The material, substantive facts pleaded are those upon which the validity of the plea must depend; its sufficiency can not be made to depend upon a sweeping concluding statement that the article was wholly without value. If this were the rule, then every plea attempting the defense of fraud could be made good by adding the general allega-

[21](1853) 8 Ex. 724. Referred to above, p. 526.

[22]Connecticut Co. *v.* Kavanagh (1892) A. C. 473, 9.

[23]It is not necessary to cite all these cases here. They may be found by reference to Oölitic Stone Co. *v.* Ridge (Ind. 1908) 83 N. E. 246; 21 Ency. Pl. & Pr. 650. There have been practically no contrary decisions. But see Miller *v.* Eldridge (Ind. 1891) 27 N. E. 132.

[24](1880) 71 Ind. 363.

[25]The Court first stated that at least one paragraph of the answer did not contain this broad statement. But the Court then discussed the case as if the pleadings were as stated in text.

[26]Page 367.

tion that the article was valueless. This we think utterly inconsistent with the rule of pleading, and we also think that such a practice would lead to confusion and injustice. Especially would it lead to evil results in the trial courts, where time is not always allowed to critically examine pleadings, and a pleading made good by an isolated general statement might often mislead both court and counsel, who would naturally consider, not detached general conclusions, but the general frame and drift of the entire pleading."

Fundamentally this reasoning is that if the theory of the pleading could be departed from in favor of a new theory to be made up out of allegations not put in for the purpose of stating this new theory, the Court and opposing counsel would be likely to be misled as to what were the issues. True, the Court talks about the generality of the allegation. But it seems difficult to take objection to the plain statement of fact that certain screens are worthless. This line of reasoning has apparently been the basis of all the later cases.[27]

The New York law is important enough to warrant a separate consideration. The earliest cases the writer has seen arose after the introduction of code pleading. The first idea seems to have been that the code, having abolished forms, made it possible for the plaintiff to recover on a cause of action if his complaint alleged the necessary facts and his evidence proved them. The theory upon which the facts were alleged was thought wholly immaterial.[28] In *See* v. *Partridge*[29] the plaintiff's complaint was based on the theory that a certain award was void and that the plaintiff was entitled to recover the actual amount due as if there had been no award. The court permitted recovery of the amount awarded to the plaintiff by the arbitrators. The court relied mainly upon the code provision that where an answer has been filed "the court may grant him (*i. e.*, the plaintiff)[30] any relief consistent with the case made by the complaint and embraced within the issue." Of course this reasoning overlooked the question whether "the case made by the complaint" could properly be interpreted as meaning a case

[27]See Tibbet *v.* Zurbuch (1898) 22 Ind. Ap. 354, 61.

[28]See *v.* Partridge (1853) 2 Duer 463; Wright *v.* Hooker (1851) 10 N. Y. 51; Marquat *v.* Marquat (1855) 12 N. Y. 336, 41; Emery *v.* Pease (1859) 20 N. Y. 62; White *v.* Madison (1862) 26 N. Y. 117, 125; Quintard *v.* Newton (1867) 5 Robt. 72, 78; Conaughty *v.* Nichols (1870) 42 N. Y. 83. The intimations to the contrary when the change would be one from law to equity, found in Heywood *v.* City (1856) 14 N. Y. 534, 40 and in Short *v.* Barry (1870) 3 Lans. 143, 147 may be disregarded, since it was held in Marquat *v.* Marquat, above, and other cases, that such a change could be made.

[29](1853) 2 Duer 463.

[30]This insertion was made by the present writer.

made out of allegations in the complaint but put there for a different purpose. This oversight makes the opinion unsatisfactory. The more usual argument is stated by Mr. Justice Edwards in *Wright* v. *Hooker*[31] in these words:

"I think these allegations are sufficient to sustain the judgment of the court that Hooker became liable as one of the drawers of the bill in suit. It is true that it would appear that the person who drew the complaint contemplated that Hooker would be held liable in some other capacity. But that is immaterial. The very object of the new system of pleading was to enable the court to give judgment according to the facts stated and proved, without reference to the form used or to the legal conclusions adopted by the pleader."

In *Conaughty* v. *Nichols*[32] the Court said:

"* * * the facts were fully stated, and the defendants apprized of what they were to meet upon the trial, and there is no pretense that they were surprised. If they chose to accept the complaint without moving to strike out any portion of it, or to compel the plaintiff to make it more definite, or to elect in regard to the form of action, they should not, upon the trial, have been allowed to prevent a recovery by the plaintiff of a judgment for the amount of his demand. * * * It is quite probable that the plaintiff intended, down to the trial, to recover against the defendants for a wrongful conversion of the proceeds of the sale of the property consigned to them, and doubtless the mistake should have been fatal but for the ample statement of facts contained in the complaint, which justified a recovery on contract for the amount of his demand. It does not follow that, because the parties go down to trial upon a particular theory, which is not supported by the proof, the cause is to be dismissed, when there are facts alleged in the complaint, and sustained by the evidence, sufficient to justify a recovery upon a different theory or form of action. There is no substantial reason why, under such circumstances, a party should be turned out of court and compelled to commence a new action, thereby occasioning expense, delay and multiplicity of suits to accomplish a just result."

Such was the state of the law in New York when *Ross* v. *Mather*[33] came up for final disposition. That fraud is fatal seems to be exemplified in a new way in this particular rivulet of the law. The complaint was rather ambiguous in theory, containing allegations sufficient to state a cause of action either upon a warranty or for fraudulent representations. The court held that the theory of the complaint was deceit and that without proof of fraud the

[31](1851) 10 N. Y. 51, 59.
[32](1870) 42 N. Y. 83, 8.
[33](1872) 51 N. Y. 108.

plaintiff must fail. The court rather intimated that the warranty could not be sued on without waiving the fraud, that it was a case of election. That seems untrue. The remedy for the deceit and the remedy on the warranty are consistent and may be pursued in the same action.[34] For other argument the Court said:

"The two causes of action are entirely distinct, and there can be no recovery as for a breach of contract, where a fraud is the basis of the complaint.[35] *Conaughty* v. *Nichols*[36] is the only authority cited to the contrary, and it does not sustain that position."

This case, though rather poorly reasoned, appears to have led to a rule of the New York courts that if the theory of a complaint is plainly that of seeking to recover for a tort no recovery on a contract can be permitted.[37] The reason for this rule is well stated in *Barnes* v. *Quigley*.[38] It is substantially that of the Indiana courts, the possible surprise to the other party if one could depart from the apparent theory of his pleading. It is obvious that this reason applies just as fully to any real change of theory as it does to a change from contract to tort or *vice versa*. Has there been a broader application of the principle?

A change from a theory that the action was legal to a theory that it was equitable seems as fundamental as one from tort to contract. The earlier cases made no objection to any change of theory and so of course permitted this.[39] In *Williams* v. *Slote*[40] this early rule was followed, there being no reference to *Ross* v. *Mather*[41] decided meanwhile. In *Husted* v. *Van Ness*,[42] however, the court apparently held that a complaint with an equitable theory would not sustain a legal judgment. The case is not clear, and furthermore the court relied upon *Oakville Co.* v. *Co.*,[43] a case of

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[34]Joy *v.* Bitzer (1889) 77 Ia. 73.

[35]The court here referred to cases previously cited by it which need not be noticed.

[36](1870) 42 N. Y. 83. Quoted above, p. 530.

[37]Ledwich *v.* McKim (1873) 53 N. Y. 307, 16 (*semble*); Barnes *v.* Quigley (1874) 59 N. Y. 265; Peck *v.* Root (1875) 5 Hun 547; Neftel *v.* Lightstone (1879) 77 N. Y. 96, 98 (*semble*); Sparman *v.* Keim (1880) 83 N. Y. 245 (*semble*); Allen *v.* Allen (1889) 52 Hun 398; Stafford *v.* Azbell (1893) 6 Misc. 89 (*semble*, stating rule generally.)

[38](1874) 59 N. Y. 265.

[39]See note 28, and, especially, Marquat *v.* Marquat (1855) 12 N. Y. 336; Emery *v.* Pease (1859) 20 N. Y. 62.

[40](1877) 70 N. Y. 601.

[41](1872) 51 N. Y. 108.

[42](1899) 158 N. Y. 104.

[43](1887) 105 N. Y. 658.

variance.[44] It is difficult to tell what the New York law is on this point.

New York cases involving a change of theory without involving a change from tort to contract or from law to equity are not numerous and what the rule will ultimately be is not clear. The cases are epitomized in a note.[45] The significant thing is that here also there are cases compelling a party to abide by his theory. *Ross* v. *Mather*[46] has had the effect of unsettling the law as laid down in the earlier cases.[47] The Indiana view may come to be the law of New York.

It is sufficiently apparent by this time that no general statement of the law on this point can be made. Nice and probably unfounded discriminations are made within a single jurisdiction. In many states later cases are decided without attention to and probably without any but judicial knowledge of prior adjudications. In a recent Kansas case[48] the Court adopts the Indiana rule in the strongest language. It relies wholly on Indiana cases and apparently had no knowledge of two earlier cases[49] in its own reports the reasoning in which is to the contrary. One may with reasonable assurance say that Wisconsin compels one to abide by his theory.[50] In Massachusetts apparently the opposite view is taken.[51] Elsewhere the cases are either isolated or so inconsistent as to make a general statement impracticable.[52]

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[44]For the distinction between our question and that of variance, see above, pp. 523-524.

[45]Harrison *v.* Co. (1885) 100 N. Y. 621 (complaint in ejectment containing allegations showing a trespass sustained on latter theory); Prince *v.* Ridge (1900) 66 N. Y. Supp. 454 (complaint for an assault containing allegations showing a battery *not* sustained on latter theory); Cassidy *v.* Uhlmann (1902) 170 N. Y. 505, 37 (complaint for fraud probably also alleging a case of negligence *not* sustained on latter theory, but case arose after appeal.)

[46](1872) 51 N. Y. 108.

[47]See above, pp. 529-530.

[48]Gretner *v.* Fehrenschield (1902) 64 Kan. 764 (merely a dictum).

[49]Akin *v.* Davis (1873) 11 Kan. 580 (question arose for first time on appeal); Kunz *v.* Ward (1882) 28 Kan. 132 (same).

[50]Newton *v.* Allis (1860) 12 Wis. 421; Supervisors *v.* Decker (1872) 30 Wis. 624 (leading case); Horn *v.* Ludington (1873) 32 Wis. 73; Pierce *v.* Carey (1875) 37 Wis. 232; Wrigglesworth *v.* Same (1878) 45 Wis. 255; Sweeney *v.* Vroman (1884) 60 Wis. 278; Trustees *v.* Kilbourn (1889) 74 Wis. 452; Kruczinski *v.* Neuendorf (1898) 99 Wis. 264 (*semble*).

[51]Boston R. R. *v.* Bartlett (1849) 3 Cush. 224; Lamson *v.* Drake (1870) 105 Mass. 564, 8.

[52]In accord with the Indiana rule are: Strange *v.* Watson (1847) 11 Ala. 324, 6 (*semble*); Oden *v.* Lockwood (1902) 136 Ala. 514; Jones *v.* Minogue (1874) 29 Ark. 637, 48 (*semble*); Hayes *v.* Fine (1891) 91 Cal. 391, 9; Prince *v.* Lamb (1900) 128 Cal. 120, 5; Westerfield *v.* Co. (1900) 129 Cal. 68, 81; Britton *v.* Brewster (1880) 2 Fed. 160, 7 (*semble*); Holton *v.* Guinn (1895) 65 Fed. 450; Baker *v.* Updike (1895) 155 Ill. 54, 7; Harms *v.* Jacobs

This distinct conflict of authority is not very surprising, since the arguments drawn from legal theory or substantial justice are evident and rather evenly balanced. For the Indiana view the argument of surprise, already sufficiently stated,[53] is the chief one. And there are indications, especially in the New York cases,[54] that where the danger of surprise is small the Indiana rule will not be applied. For the view that one may depart from his theory it may be said that it avoids the deciding of cases on what will certainly appeal to a layman as a technical ground. If the facts are alleged in accordance with the provisions of the codes, is there not a partial return to forms when it is required that the facts shall be stated in accordance with some particular theory? That the wrong theory is chosen will almost always be the fault of the lawyer rather than of the client. When technical errors of the attorney prove disastrous, the client is likely to hurl epithets at the law. Our procedure is already quite vulnerable to attack. The weak spots should not be increased. Perhaps to hold that, when the adoption of a theory by one party *has* in fact misled the other to his detriment, then the latter shall be entitled to such relief as

(1895) 158 Ill. 505; French *v.* Goodman (1897) 167 Ill. 345; Boyce *v.* Allen (1898) 105 Ia. 249, 55; Wilson *v.* Eggleston (1873) 27 Mich. 257, 61; Nicholson *v.* Dyer (1888) 45 Mich. 610, 16 (change not suggested until after appeal); New Orleans Ry. *v.* Hurst (1858) 36 Miss. 660, 8 (*semble*); State *v.* Dehlinger (1870) 46 Mo. 106 (*semble*); Clements *v.* Yeates (1879) 69 Mo. 623; Summer *v.* Rogers (1886) 90 Mo. 324 (change first suggested in appellate court); Huston *v.* Tyler (1897) 140 Mo. 252; Higley *v.* Gilmer (1878) 3 Mont. 90, 104 (implication, *accord*); Appeal of Thompson (1889) 126 Pa. St. 367; Tillinghast *v.* Champlin (1856) 4 R. I. 173, 191-202 (like English cases in equity holding that where fraud is alleged, it must be established or suit fails; cf. R. I. case cited below as *contra*); Eyre *v.* Potter (U. S. 1853) 15 How. 42, 56.

To the contrary are: Pindall *v.* Trevor (1875) 30 Ark. 249, 60; White *v.* Lyons (1871) 42 Cal. 279; Hurlbutt *v.* Co. (1892) 93 Cal. 55; Faulkner *v.* Bank (1900) 130 Cal. 258; Hollister *v.* Lefevre (1868) 35 Conn. 456, 61; Whalen *v.* Sheridan (1879) Fed. Cases, 17,476; Hall *v.* Co. (1882) 15 Fed. 57; Adams *v.* Co. (1888) 36 Fed. 212; Allen *v.* Woodruff (1880) 96 Ill. 11, 18 (possibly holding merely that did recover according to real theory of bill); Way *v.* Co. (1887) 73 Ia. 463, 4 (possibly holding merely that can recover on either of two theories); Thomas *v.* Hite (1845) 5 B. Mon. 590, 3; Tiernan *v.* Poor (1829) 1 G. & J. 216, 30; Cochrane *v.* Adams (1883) 50 Mich. 16, 17 (*semble*); Darrah *v.* Boyce (1886) 62 Mich. 480, 5 (*semble*); Dayton *v.* Same (1888) 68 Mich. 437; Garner *v.* Co. (1863) 34 Mo. 235; Comings *v.* Co. (1871) 48 Mo. 512; Kneale *v.* Price (1886) 21 Mo. Ap. 295; Crothers *v.* Acock (1891) 43 Mo. Ap. 318, 23; Blair *v.* Porter (1861) 13 N. J. Eq. 267; McElwee *v.* Blackwell (1886) 94 N. C. 261 (facts not clear); Cook *v.* Haggerty (1859) 36 Pa. St. 67 (also allowed change in form of action); Aldrich *v.* Wilcox (1873) 10 R. I. 405, 17; Martin *v.* Lincoln (Tenn. 1880) 4 Lea 334.

See also Walton *v.* Perkins (1881) 28 Minn. 413.

[53] See pp. 527-8; 529; 531.

[54] See Neftel *v.* Lightstone (1879) 77 N. Y. 96, 98-9.

will enable him to avoid the effects of his misunderstanding, would be a satisfactory solution. Proper relief might consist of an order that the misleading pleading be amended and that the other party have a right to reply to it anew. In many cases, no doubt, any harm that had occurred could be remedied without making worthless so much of the proceedings that had already taken place. The reasoning of the Court in *Conaughty* v. *Nichols*[55] that where the pleading is misleading the defendant should move to make it definite or to have the pleader elect between the possible theories, and that if he proceeds without doing so he is to be taken as fully understanding the pleading, seems very weak. If he in fact recognizes the ambiguity, the only situation in which he could move to have it corrected, then he is plainly not actually misled by it and would under the solution just suggested be entitled to no relief. If he does not recognize the ambiguity, the reasoning of the Court could be thought right only on the ground that he was at fault in not recognizing it. But the pleader himself was at fault in filing such a pleading and he was first in fault. Also to refuse all relief because of this error of the opposing party's attorney, is to again punish the client for his lawyer's fault with unnecessary severity; —a thing, as suggested above, likely to bring the law into disrepute. The disposition of costs may be used to adjust the burdens arising from a possible re-trial of the case as equitably as possible.

In connection with the general subject a number of minor questions may be asked. These will now be disposed of as briefly as possible.

Does the rule that one cannot depart from the theory of his pleading apply to pleas, answers, replications, and other pleadings, or only to the declaration, complaint, bill or petition of the complainant? There seems to be no reason for drawing any distinction along this line. The Indiana cases hold that pleas must be sustained according to their theory.[56] The few cases elsewhere have taken the opposite view,[57] but without suggesting that the fact that the question arose as to a plea made any difference. Presumptively there is no such distinction.

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[55](1870) 42 N. Y. 83, 8. Quoted above, p. 530.

[56]Neidefer *v.* Chastain (1880) 71 Ind. 363; Colglazier *v.* Same (1888) 117 Ind. 460.

[57]Le Bret *v.* Papillon (1804) 4 East 502; Whalen *v.* Sheridan (1879) 17 Blatchf. 9; Fed. Cases 17,476; Springer *v.* Dwyer (1872) 50 N. Y. 19; Hemmingway *v.* Poucher (1885) 98 N. Y. 281, 7. In the following cases it was held that an answer pleaded as a defense could not be used as a cross-demand or *vice versa*: Hinkle *v.* Margerum (1875) 50 Ind. 240, 6; Conger *v.* Miller (1885) 104 Ind. 592; Bates *v.* Rosekrans (1861) 23 How. Pr. 98.

A number of cases have raised this problem. The plaintiff drew his declaration or complaint on one theory. He wished to change to a new theory but there were not enough facts alleged in the declaration or complaint to warrant that.[58] These necessary facts, however, were alleged in the defendant's pleading. Would this enable him to adopt the new theory? Obviously not, in a jurisdiction where the Indiana view prevails: there he cannot depart from his theory even when the necessary facts are in the declaration. In other jurisdictions the question is one of the limits of express aider.[59] There seems to be nothing in that doctrine forbidding this application of it, unless the use of the word aider indicates that there must be something in the declaration to aid. If that were taken to be true, then, unless *some* of the allegations necessary to state the new cause of action were in the declaration the plaintiff would fail. A few of the cases have contained just that state of facts. Such a distinction, however, seems rather valueless. The better view would, therefore, appear to be that the plaintiff can recover.[60]

It is plain that even if a party be allowed to change his theory yet he cannot do this where, considering the suit as on the new theory, the proceedings would be defective, as for non-joinder of parties[61] or misconception of remedy.[62]

Suppose that a count or paragraph has two theories or that it is uncertain what its theory is. It seems to be universally conceded that this is no objection on demurrer.[63] The remedy is by motion.

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[58]See above, p. 524.

[59]See 4 Encyc. Pl. & Pr. 608.

[60]Pindall *v.* Trevor (1875) 30 Ark. 240, 60; Mortimer *v.* Orchard (1793) 2 Ves. Jr. 243; Cook *v.* Smith (1880) 54 Ia. 636; Kunz *v.* Ward (1882) 28 Kan. 132 (*semble*); Rose *v.* Mynatt (Tenn. 1834) 7 Yerg. 30, 36; Shannon *v.* Erwin (Tenn. 1873) 11 Heisk. 337; Heinz *v.* Bank (Tenn. 1897) 48 S. W. 133. *Accord.*

Mercier *v.* Lewis (1870) 39 Cal. 532; Marsh *v.* Bulteel (1822) 5 B. & Al. 507; Head *v.* Baldrey (1837) 6 A. & E. 459, 69 (*semble*); Lindsay *v.* Lynch (1804) 2 Sch. & Lef. 1, 9; Willis *v.* Evans (1802) 2 Ball & Beat. 225 (*semble*); Rand *v.* Bank (1877) 77 N. C. 152; Grant *v.* Burgwyn (1883) 88 N. C. 95, 100; Johnson *v.* Finch (1885) 93 N. C. 205; Willis *v.* Branch (1886) 94 N. C. 142, 7; (But see Harris *v.* Sneeden (1889) 104 N. C. 369, 76); Perls *v.* Co. (1890) 15 Daly 517. *Contra.*

See also Jameson *v.* Shelby (Tenn. 1840) 2 Humph. 198; Neal *v.* Robinson (Tenn. 1847) 8 Humph. 435; Blair *v.* Porter (1861) 13 N. J. Eq. 267.

[61]Easterly *v.* Barber (1876) 66 N. Y. 433, 40.

[62]Heywood *v.* City (1856) 14 N. Y. 534, 40.

[63]Kreag *v.* Anthus (1891) 2 Ind. Ap. 482; Mark *v.* North (1900) 155 Ind. 575; Oölitic Co. *v.* Ridge (Ind. 1908) 83 N. E. 246 (*semble*); Akin *v.* Davis (1873) 11 Kan. 580, 90 (*semble*); Seckinger *v.* Co. (1895) 129 Mo. 590, 602; Quintard *v.* Newton (N. Y. 1867) 5 Robt. 72, 9 (*semble*); Kuehn *v.* Wilson (1860) 13 Wis. 104, 8 (*semble*).

If two theories are stated the remedy is by motion to separately state the causes of action,[64] or to elect between them.[65] If no such motion is made, in a jurisdiction requiring one to abide by his theory, the Court will determine which is the true theory and the party must sustain that.[66] In other jurisdictions the party may succeed by proving either theory.[67] If it is uncertain what the theory is, the remedy is by motion to make definite[68] or in some jurisdictions, if the two possible theories would be inconsistent, to elect between them.[69] In a jurisdiction following Indiana, if no such motion were made, the party would have to sustain his pleading on its true theory.[70] In other states he could recover on either possible theory.[71]

The theory of a case does not involve the amount of relief. It has to do only with the ground for relief. Therefore one does not depart from his theory when he obtains less relief than he asked for.[72] Likewise if the relief to which one is entitled is slightly different from that asked, this does not amount necessarily to a change of theory.[73] But this must not be confused with such a change as seeking an injunction instead of damages[74] or specific performance instead of legal recovery.[75] The allegations requisite to obtain equitable relief are different from those necessary to obtain legal relief. The theory of the cause of action, therefore, is different.

Granting that it has become necessary to determine the theory of a pleading, how is that to be done? At common law the form of action is not settled by the name given to it by the pleader, but by asking what form is indicated by the count as a whole, the

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[64]Mark *v.* North (1900) 155 Ind. 575.

[65]Meyers *v.* McQueen (1891) 85 Mich. 156, 60; Seckinger *v.* Co. (1895) 129 Mo. 590, 602 (*semble*).

[66]Oölitic Co. *v.* Ridge (Ind. 1908) 83 N. E. 246 (*semble*). But a complaint praying alternative relief is good. Culbertson *v.* Munson (1885) 104 Ind. 451.

[67]Williams *v.* U. S. (1890) 138 U. S. 514.

[68]Quintard *v.* Newton (N. Y. 1867) 5 Robt. 72, 9; Com. Bank *v.* Pfeiffer (1888) 108 N. Y. 242, 6 (*semble*); Kuehn *v.* Wilson (1860) 13 Wis. 104, 8.

[69]Akin *v.* Davis (1873) 11 Kan. 580, 90 (*semble*).

[70]Oölitic Co. *v.* Ridge (Ind. 1908) 83 N. E. 246 (*semble*).

[71]Austin *v.* Seligman (1883) 18 Fed. 519 (*semble*); Neilson *v.* Fry (1866) 16 Oh. St. 552.

[72]Yorn *v.* Bracken (1899) 153 Ind. 492.

[73]Matthias *v.* Warrington (1893) 89 Va. 533; Leonard *v.* Rogan (1866) 20 Wis. 540.

[74]City *v.* Uhl (1884) 99 Ind. 531, 9.

[75]Horn *v.* Ludington (1873) 32 Wis. 73.

substantial allegations being given chief consideration.[76] A similar rule prevails in determining the theory of a pleading. The important allegations of fact have the greatest weight. The theory that the pleader must have had in mind in making them is the true theory[77] subject to the qualifications about to be stated. A name given to the pleading does not determine its theory.[78] And as in other cases of construction some allegations may be disregarded.[79] It is now pretty well settled that the prayer for relief does not de-

[76]Sheppard *v.* Furniss (1851) 19 Ala. 760; Whilden *v.* Bank (1879) 64 Ala. 1, 26; Sharpe *v.* Bank (1888) 87 Ala. 644; Humiston *v.* Smith (1852) 22 Conn. 19; Savignac *v.* Roome (1794) 6 T. R. 125; Ansell *v.* Waterhouse (1817) 6 M. & S. 385; Brill *v.* Neele (1819) 3 B. & Al. 208; Corbett *v.* Packington (1827) 6 B. & C. 268; White *v.* Pulley (1886) 27 Fed. 436; McGinnity *v.* Laguerenne (1848) 10 Ill. 101 (and see Cruickshank *v.* Brown (1848) 10 Ill. 75; Smith *v.* Webb (1854) 16 Ill. 105); Toledo R'y Co. *v.* McLaughlin (1872) 63 Ill. 389; Cornes *v.* Harris (1848) 1 N. Y. 223; Smith *v.* Seward, (1846) 3 Pa. St. 342; Cook *v.* Haggarty (1850) 36 Pa. St. 67 (going too far); Angus *v.* Dickerson (1838) Meigs 450, 66; Booker *v.* Donohue (1897) 95 Va. 350.

[77]Fordyce *v.* Nix (1893) 58 Ark. 136; Prince *v.* Lamb (1900) 128 Cal. 120; Westerfeld *v.* Co. (1900) 129 Cal. 68, 81; Coe *v.* Waters (1895) 7 Colo. Ap. 203; Baxter *v.* Camp (1898) 71 Conn. 245, 51; Blalock *v.* Society (1896) 75 Fed. 43; Adams *v.* Lamar (1850) 8 Ga. 83, 7; City Ry. *v.* Brauss (1883) 70 Ga. 368; Allen *v.* Woodruff (1880) 96 Ill. 11, 18; City *v.* Uhl (1884) 99 Fed. 531, 9; First Bank *v.* Root (1886) 107 Ind. 224; Louisville Co. *v.* Bryan (1886) 110 Ind. 51; Gregory *v.* Co. (1887) 112 Ind. 385; Martin *v.* Same (1888) 118 Ind. 227, 36; Jones *v.* Cullen (1895) 142 Ind. 335, 41; Oölitic Co. *v.* Ridge, (Ind. 1908) 83 N. E. 246 (*semble*); U. P. Ry. *v.* Shook (1896) 3 Kan. Ap. 710; Paige *v.* Barrett (1890) 151 Mass. 67; Church *v.* Co. (1898) 118 Mich. 219, 41; New Orleans Ry. *v.* Hurst (1859) 36 Miss. 660; State *v.* Dehlinger (1870) 46 Mo. 106; Rodgers *v.* Same (1852) 11 Barb. 595, 600; Ridder *v.* Whitlock (1856) 12 How. Pr. 208; Williams *v.* Slote (1877) 70 N. Y. 601; Lindsay *v.* Mulqueen (1882) 26 Hun 485; McDonough *v.* Dillingham (1887) 43 Hun 493; Bell *v.* Merrifield (1888) 109 N. Y. 202; O'Brien *v.* Ottenberg (1894) 28 N. Y. Supp. 605; Leach *v.* Smith (1898) 27 N. Y. App. Div. 290; MacArdell *v.* Olcott (1907) 189 N. Y. 368, 77; Corry *v.* Gaynor (1871) 21 Oh. St. 277; Tiffin Co. *v.* Stoehr (1896) 54 Oh. St. 157; Raymond *v.* Ry. (1897) 57 Oh. St. 271, 84; Denman *v.* Ry. (1897) 52 Neb. 140; Yager *v.* Bank (1897) 52 Neb. 321; Tillinghast *v.* Champlin (1856) 4 R. I. 173, 202; Hammond *v.* Co. (1875) 6 S. Car. 130; Atlantic Ry. *v.* Laird (1896) 164 U. S. 393, 7; Booker *v.* Donohoe (1897) 95 Va. 359; Lane *v.* Cameron (1875) 38 Wis. 603; Medcraft *v.* Dartt (1886) 67 Wis. 115; Potter *v.* Van Norman (1889) 73 Wis. 339, 44; McKeon *v.* Co. (1896) 94 Wis. 477, 81.

[78]Martin *v.* Same (1888) 118 Ind. 227, 36 (*semble*); Woodward *v.* Mitchell (1894) 140 Ind. 406 (*semble*). So also the name given a pleading does not determine what kind of a pleading it is. McClanahan *v.* Williams (1893) 136 Ind. 30.

[79]Fordyce *v.* Nix (1893) 58 Ark. 136; Thomson *v.* Eastwood (1877) 2 A. C. 215, 241, 250; Blalock *v.* Society (1896) 75 Fed. 43; Gregory *v.* Co. (1887) 112 Ind. 385; Kunz *v.* Ward (1882) 28 Kan. 132; Byxbie *v.* Wood (1862) 24 N. Y. 607; Greentree *v.* Rosenstock (1875) 61 N. Y. 583, 9; Miller *v.* Barber (1876) 66 N. Y. 558, 64; Neftel *v.* Lightstone (1879) 77 N. Y. 96; Leach *v.* Smith (1898) 27 N. Y. App. Div. 290; Harris *v.* Sneeden (1889) 104 N. C. 369, 75; Dungan *v.* Read (1895) 167 Pa. St. 393; Tillinghast *v.* Champlin (1856) 4 R. I. 173, 202; Bailey *v.* Co. (1890) 77 Wis. 336.

termine the theory of the action,[80] but that at least where the theory is hard to determine[81] and probably in all cases[82] the prayer for relief may be considered in deciding what the theory is. There is considerable doubt whether other proceedings in the case, especially the summons, may be considered in determining the theory.[83] There seems to be no objection to such a use if it be kept in mind

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[80]Ross *v.* Purse (1891) 17 Colo. 24, 7; Adams *v.* Lamar (1850) 8 Ga. 83; Houck *v.* Graham (1885) 106 Ind. 195; McGuffey *v.* McClain (1891) 130 Ind. 327; State *v.* Ogan (1902) 159 Ind. 119; Hale *v.* Bank (1872) 49 N. Y. 626, 31; Williams *v.* Slote (1877) 70 N. Y. 601; Bell *v.* Merrifield (1888) 109 N. Y. 202; Bennett *v.* Vonder Bosch (1898) 26 N. Y. App. Div. 311; Corry *v.* Gaynor (1871) 21 Oh. St. 277; Reed's Admr. *v.* Reed (1874) 25 Oh. St. 422; Tiffin Co. *v.* Stoehr (1895) 54 Oh. St. 157; Hammond *v.* Co. (1874) 6 S. Car. 130; Bailey *v.* Co. (1890) 77 Wis. 336. *Accord.*

Christian Church *v.* Scholte (1856) 2 Ia. 27; Price *v.* Co. (1890) 80 Ia. 408; Boyce *v.* Allen (1898) 105 Ia. 249, 55; Dows *v.* Green (1849) 3 How. Pr. 377 (see New York cases *accord* above); Lowber *v.* Connit (1874) 36 Wis. 176 (see Wisconsin cases *accord* above). *Contra.*

[81]Yeater *v.* Hines (1886) 24 Mo. App. 619; Harral *v.* Gray (1880) 10 Neb. 186; Keens *v.* Gaslin (1888) 24 Neb. 310, 16; Yager *v.* Bank (1897) 52 Neb. 321; Spalding *v.* Same (1848) 3 How. Pr. 297; Rodgers *v.* Same (1852) 11 Barb. 595; Chambers *v.* Lewis (1860) 2 Hilton 591; Bates *v.* Rosekrans (1861) 23 How. Pr. 98, 102 (concerning an answer); Mills *v.* Bliss (1873) 55 N. Y. 139; Central Co. *v.* Sheridan (1892) 1 Misc. 386; Corry *v.* Gaynor (1871) 21 Oh. St. 277; Gillett *v.* Treganza (1861) 13 Wis. 472; Cobb *v.* Smith (1868) 23 Wis. 261; Bailey *v.* Co. (1890) 77 Wis. 336. In O'Brien *v.* Fitzgerald (1894) 143 N. Y. 377 the court held that in a doubtful case the prayer determined the theory. Of course under a common code provision if no answer is filed no relief beyond that prayed can be given. Swart *v.* Boughton (1885) 35 Hun 281.

[82]Prince *v.* Lamb (1900) 128 Cal. 120; Blalock *v.* Society (1896) 75 Fed. 43; Seymour *v.* Van Curen (1859) 18 How. Pr. 94; Miller *v.* Barber (1876) 66 N. Y. 558, 64; Goodwin *v.* Griffis (1882) 88 N. Y. 629, 38; McDonough *v.* Dillingham (1887) 43 Hun 493, 6; MacArdell *v.* Olcott (1907) 189 N. Y. 368, 78; Reed's Adm'r. *v.* Reed (1874) 25 Oh. St. 422; Brown *v.* Runals (1861) 14 Wis. 693; Potter *v.* Van Norman (1889) 73 Wis. 339, 44. *Accord.*

Hale *v.* Bank (1872) 49 N. Y. 626, 31; Tiffin Co. *v.* Stoehr (1895) 54 Oh. St. 157. *Contra.*

[83]That other proceedings in the case may be considered, see City Ry. *v.* Brauss (1883) 70 Ga. 368, 77 (defendant's plea: point not considered by the court); Elwood *v.* Gardner (1871) 45 N. Y. 349, 54 (summons); Ledwich *v.* McKim (1873) 53 N. Y. 307, 16 (summons); Peck *v.* Root (1875) 5 Hun 547 (summons); Miller *v.* Barber (1876) 66 N. Y. 558, 64 (summons); Catlin *v.* Co. (1880) 11 Abb. N. C. 377 (summons); Supervisors *v.* Decker (1872) 30 Wis. 624, 32 (summons).

To the contrary, see Metropolis Co. *v.* Lynch (1896) 68 Conn. 459, 71 (that plaintiff had defendant arrested and demurred to a plea in abatement as if action were tort); Tibbet *v.* Zurbuch (1898) 22 Ind. Ap. 354, 63 (evidence offered); Chambers *v.* Lewis (1860) 10 Abb. Pr. 206 (summons); Welsh *v.* Darragh (1873) 52 N. Y. 590 (defendant's answer, thinking perhaps rightly that it could not throw light on the complaint); Gopen *v.* Crawford (1875) 53 How. Pr. 278 (summons); Wood *v.* Hope (1876) 2 Abb. N. C. 186 (like Welsh *v.* Darragh above); Goodwin *v.* Griffis (1882) 88 N. Y. 629, 30 (like Welsh *v.* Darragh above); Haynes *v.* McKee (1896) 18 Misc. 361 (summons); Barneycastle *v.* Walker (1885) 92 N. C. 198 (summons).

See also Chambers *v.* Lewis (1860) 2 Hilt. 591 (summons); Adams *v.* Ash (1887) 46 Hun 105 (judgment rendered); Stafford *v.* Azdell (1893) 6 Misc. 89 (order for arrest of defendant).

that they are to be looked at merely to aid in construing the pleading in question. The problem is not, what sort of a pleading did the party intend to file, but rather, what is the theory of the pleading he has filed. Of course questions may arise involving something different from the theory of the pleading and where the other proceedings may be properly given a greater influence in the decision.[84] Clearly the summons cannot determine the theory of the complaint.[85]

There are a few curious cases which hold that when the theory is doubtful it is to be decided by some fixed rule. A couple of cases in New York adopt the rule that that theory shall be selected which is most disadvantageous to the pleader.[86] Thus where it was doubtful whether the theory was that the action was on a contract or for a tort and the summons was the form for a contract action, the theory of the complaint was held tort because that would create a variance between the summons and the complaint which would subject the complaint to an adverse motion and so be less advantageous to the plaintiff.[87] In the other case the complaint was held to be on a contract as that would cause stricter rules as to damages to be applied to the plaintiff's action.[88] Perhaps these cases are a logical application of the common law rule that pleadings must be construed adversely to the pleader. But they certainly seem contrary to the spirit of the New York Code under which they were decided. The first code in 1848 provided for a liberal construction of pleadings.[89] There are some rather extraordinary cases holding that this provision applies only to matters of form.[90] The cases under discussion must be added to these. But we surely discover absurdity when we find it held that if it be doubtful whether the action be on a contract or for a tort that it is to be taken to be on a contract.[91] No reasons were given in the case originating this doctrine nor in those following. Presumably none

[84]Sligh Co. *v.* Shannon (1897) 113 Mich. 473; Leeper *v.* Taylor (1848) 11 Mo. 312, 21.

[85]Greentree *v.* Rosenstock (1875) 61 N. Y. 583, 90.

[86]Ridder *v.* Whitlock (1856) 12 How. Pr. 208, 12; May *v.* Georger (1897) 21 Misc. 622.

[87]Ridder *v.* Whitlock (1856) 12 How. Pr. 208.

[88]May *v.* Georger (1897) 21 Misc. 622.

[89]Rev. Sts. of N. Y. 1848, Vol. III, p. 742, sec. 136.

[90]See 4 Ency. Pl. & Pr. 753.

[91]Goodwin *v.* Griffis (1882) 88 N. Y. 629, 39 (the case that originated this notion); McDonough *v.* Dillingham (1887) 43 Hun 493; Central Co. *v.* Sheridan (1892) 1 Misc. 386; May *v.* Georger (1897) 21 Misc. 622; Foote *v.* Foulke (1900) 67 N. Y. Supp. 368. All the cases go back to Goodwin *v.* Griffis, above.

could be given. Equally absurd are two Mississippi cases holding that under such circumstances the suit is to be deemed for a tort.[92]

When the case has been tried at *nisi prius* by all parties on the view that a pleading has a certain theory, that view will be adhered to on appeal, if there are sufficient allegations in the pleading to support the theory. If there are not sufficient allegations, the recovery below involved a variance between allegations and proof and was therefore erroneous.[93] When there are sufficient allegations the view adopted below will be followed whether the upper Court thinks that view a right one[94] or a wrong one.[95]

CLARKE BUTLER WHITTIER.

THE UNIVERSITY OF CHICAGO.

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[92]Heirn *v.* McCaughn (1856) 32 Miss. 17, 39; New Orleans Ry. *v.* Hurst (1859) 36 Miss. 660.

[93]See above, p. 524.

[94]McDaniel *v.* Pattison (1893) 98 Cal. 86; Conn. Co. *v.* Kavanagh (1892) A. C. 473, 9 (*semble*); Oölitic Co. *v.* Ridge (Ind. 1908) 83 N. E. 246 (containing very numerous Indiana citations); Raub *v.* Nisbett (1896) 111 Mich. 38; Seckinger *v.* Co. (1895) 129 Mo. 590, 602; Salisbury *v.* Howe (1881) 87 N. Y. 128; Wait *v.* Borne (1890) 123 N. Y. 592, 605; Matthews *v.* Same (1892) 133 N. Y. 679; Haynes *v.* McKee (1896) 18 Misc. 361. Many citations are found in 21 Ency. Pl. & Pr. 664.

[95]Broughel *v.* Co. (1900) 72 Conn. 617, 27; Akin *v.* Davis (1873) 11 Kan. 580, 9; Kunz *v.* Ward (1882) 28 Kan. 132. *Accord.*

Raymond *v.* Co. (1897) 57 Oh. St. 271, 83. *Contra.*

In Neftel *v.* Lightstone (1879) 77 N. Y. 96 it was held that the ruling of the trial court on the question of the true theory of a pleading would not be reversed unless very clearly wrong.